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IN THE

Supreme Court of the United States

October Term, 1956

No. 489

VAN CURLER BROADCASTING CORPORATION, *Petitioner*,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION AND HUDSON VALLEY BROADCASTING CO., INC., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the Federal Communications Commission appears at page 94 of the Joint Appendix (R. 948). The opinion of the Court of Appeals sitting *en banc* has not yet been reported. It is attached as

an appendix to this brief together with an earlier opinion of a panel of the Court of Appeals on motions for stay.

JURISDICTION

The judgment of the Court of Appeals was entered on July 9, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Do the procedural safeguards provided in the case of public rule making in Section 4 of the Administrative Procedure Act prohibit secret intervention by, and *in camera* arguments from, interested persons who have not made their appearance in the public proceedings held pursuant to the Section before the Federal Communications Commission?

2. Are rule-making proceedings under Section 4 of the Administrative Procedure Act subject to the rule of *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U.S. 327, so that the Federal Communications Commission may not grant the rule-making proposal of one party while at the same time postponing consideration of the mutually exclusive counter-proposal of another party?

3. Does the Commission comply with the provisions of Section 4 of the Administrative Procedure Act which require a statement of the "basis and purpose" of a new rule when it promulgates a rule with a general statement which makes no reference to the issue posed by the Commission in ordering rule making, and which gives no indication of the specific statutory basis for the new rule?

STATUTES INVOLVED

1. *Administrative Procedure Act:*

Section 4(b):

"(b) *Procedures.*—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. . . ." [15 U.S.C. § 1003, 60 Stat. 238 (1946)].

2. *Communications Act of 1934, as amended:*

Section 303(g):

"[The Commission shall:] Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;". [47 U.S.C. § 303(g), 48 Stat. 1082 (1934)].

Section 307(b):

"In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." [47 U.S.C. § 307(b), 49 Stat. 1475 (1936)]

STATEMENT

This case involves rule-making proceedings which led to the allocation by the Federal Communications Commission of a VHF[1] television channel to Vail Mills, New York, a small community near the three large cities, Albany, Schenectady and Troy. At the time these proceedings began, the area was predominantly UHF.[1] In Albany, Schenectady and Troy and neighboring cities, there were one VHF channel and seven UHF channels. In operation were one VHF station and three UHF stations.

The proceedings were begun by a request by respondent Hudson Valley Broadcasting Company that the Commission allocate a second VHF channel to the area. This request came in the form of a petition requesting the institution of rule-making proceedings to amend Section 3.606 of the Commission's Rules and Regulations by allocating VHF channel 10 to Vail Mills, New York, a crossroads community of 250 people about 20 miles northwest of Schenectady (R. 1-2, 9, 41). This type of allocation change is known as a "drop in" in the trade because a new channel is "dropped into" an area. Hudson

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[1] The VHF channels (very high frequency—Channels 2-13) are lower in frequency, provide somewhat greater coverage, and have been in use longer for television broadcasting, than the UHF channels (ultra high frequency—Channels 14-83). For a number of reasons, the newer UHF stations have been unable to compete successfully with the older VHF stations in many areas, particularly where there are two or more VHF stations in operation. A year and one-half ago the Commission said: "The failure of UHF to become integrated with VHF is manifested by the fact that of 318 UHF stations authorized by the Commission, only one-third are presently in operation." (Preliminary Report of FCC to Senate Interstate and Foreign Commerce Committee re VHF-UHF and Television Network Problems, March 18, 1955).

Valley, the operator of one of the three existing UHF stations, proposed to apply for the VHF channel for its station because it was having serious financial difficulties in operating a UHF station in competition with the one VHF station (R. 357-58).

Petitioner and Greylock Broadcasting Company, both of which operated UHF stations in the area, opposed the plan on the ground that experience in other communities across the country showed that no UHF station could be operated successfully in competition with two VHF stations. The necessary consequence of allocating Channel 10 would be, they argued, to reduce the number of operating commercial stations from four (1 VHF plus 3 UHF) to two (2 VHF) and the potentiality from eight (1 VHF plus 7 UHF) to two (R. 385, 12-17, 50-53, 209-215). Petitioner recommended, as a counterproposal to the Channel 10 "drop in", that all the commercial allocations in the area be made UHF so that all stations would be placed on equal competitive footing and the maximum number of stations provided (R. 20, 29). This type of reallocation is called "deintermixture" in the trade because it eliminates the "intermixture" of UHF and VHF commercial channels in the same area.

The day before Hudson Valley's request to allocate Channel 10 was filed, the Commission granted its consent to the transfer of control of Hudson Valley to a group headed by Lowell Thomas, a commentator for the Columbia Broadcasting System (CBS). Petitioner protested against this transfer on the ground that CBS would favor Lowell Thomas and give the CBS affiliation then held by petitioner to Hudson Valley (R. 469-472, 934). Petitioner charged that the affiliation shift, which subsequently occurred, and the Chan-

nel 10 proposal, which CBS later secretly supported, were both part of a conspiracy between CBS and the Lowell Thomas group to drive petitioner out of business and make Albany-Schenectady-Troy a two-station market (R. 472, 934).

The Commission's first action was to issue a "Notice of Proposed Rule Making" requesting comments from "interested parties" by a specified date on both the Channel 10 proposal and petitioner's counterproposal (R. 58). Comments were filed by several parties including petitioner and Hudson Valley but not CBS (R. 67, 81, 206, 218).

Later the Commission issued another such notice (R. 308). It requested that the parties submit further information on, *inter alia,* the chances for successful operation of existing and potential UHF stations in the area if Channel 10 were allocated or, in the alternative, if petitioner's deintermixture counterproposal were adopted (R. 313-314). The notice established dates for the filing of comments and replies and prohibited later filings unless the Commission specifically asked for them or good cause was shown (R. 314). The Commission then scheduled oral argument for parties "who have heretofore filed timely written comments" (R. 476). It required all parties desiring to participate to file an appearance by a specified date (*Ibid.*). Comments and appearances were filed by several parties but not CBS. At the oral argument, which was open to the public, CBS did not appear. After the argument, the matter was submitted.

Several months later an article appeared in a leading trade publication stating that the Commission had just held "an unprecedented 2½ hours meeting" con-

cerning television channel allocations with the president of CBS and his aides (R. 929). Petitioner promptly filed a petition to reopen the proceedings so that it could find out precisely what CBS had said and could reply to the CBS arguments (R. 922). Petitioner alleged, upon information and belief, that CBS had opposed each of petitioner's recommendations at the *in camera* meeting; that CBS had urged the abandonment of any attempt to utilize the UHF allocations in the area; that it had opposed petitioner's deintermixture plan; and that it had supported the allocation of Channel 10 to the area—the allocation proposed by the Lowell Thomas group. (R. 930, 932-33). Petitioner requested that the record be reopened in order that it might ascertain exactly what CBS had presented to the Commission, and in order that it might rebut the CBS presentation (R. 935-36).

The Commission, however, not only denied this request but, by a vote of 4 to 3, allocated Channel 10 as requested by CBS and the Lowell Thomas group (R. 948, 954-55, 956). On November 10, 1955, it adopted the Report and Order from which appeal was taken to the court below. With respect to Channel 10, the Commission concluded (R. 954):

> "Hudson Valley requests the assignment of a new channel, Channel 10, to Vail Mills, a small community located in the Albany-Schenectady-Troy area, about 20 miles northwest of Schenectady. The Hudson Valley proposal comports with the Commission's present television allocation plan and rules. Unlike the proposals for deintermixture, the petition to assign Channel 10 to Vail Mills is consistent with the rules and principles of our present television allocations established in the Sixth Report and Order. Channel 10 would meet the present minimum spacing requirements

and all other standards.[3] Until a decision has been reached on possible amendments to our present allocation, the Commission believes that it would not be justified in withholding action, pursuant to our present allocation plan and rules, that would bring additional television service to a significant number of people. Refusing to make use of this valuable VHF frequency as contemplated by the present rules would, we believe, be a waste of valuable spectrum space for which active demand is indicated. Channel 10 in Vail Mills will represent a second television service to an appreciable percentage of families residing in the area, as well as a first service to a significant number of families. We do not believe that we would be justified in withholding this service, which can be afforded under our present rules even though we are presently considering possible amendments to our allocations. Accordingly, we are amending our rules to add the assignment of Channel 10 to Vail Mills.

"[3] It is noted that Vail Mills does not have a postoffice. A postoffice, however, is not a prerequisite to the assignment of a television channel. . . ."

With this general language and with no reference to the main argument of the opponents of Channel 10—that the total stations in the area would be reduced to two—the Commission allocated the channel. At the same time, it denied—without prejudice to later resubmission—over 40 other requests for changes in its allocation plan, including Van Curler's deintermixture proposal, on the ground that such requests must await the conclusion of further rule-making proceedings looking toward major changes in the Commission's allocation policies (R. 953-54; see also *Memorandum Opinion and Order* adopted November 10, 1955, 13 Pike & Fischer Radio Reg., p. 1522). Many of the

proposals postponed were of striking similarity to the Vail Mills action.[1] But Channel 10 was the only allocation plan of the many considered which received favorable action.

With respect to the CBS *ex parte* intervention, the Commission admitted that it had "knowledge" of the "general suggestions informally submitted to us" (R. 955). Commissioner Hyde, dissenting stated that material "*de hors* the record had been considered . . ." (R. 957). According to him, parties to the proceeding had "not had a fair opportunity to be apprised of the existence of such material, let alone meet or test the validity thereof." (*Ibid.*)

Commissioner Bartley, dissenting, referred to the Channel 10 allocation as a "slug-in" (R. 959). This expression was a novel modification of the phrase "drop in" which had frequently been used in the trade before to describe the placement of a new channel in

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[1] *E.g.*, Winnebago Television Corp., a UHF permittee in Rockford, Illinois, asked that Channel 3, presently allocated to Madison, Wisconsin, be "dropped into" Orangeville, Illinois, to serve Rockford, so that Winnebago could apply for it. The result of the plan would have been to give the Rockford area two commercial VHF channels instead of one VHF and one UHF. Final action on the merits of this plan was postponed (R. 949-50, 953-54). See also, Plains Television Corp.'s request to allocate a VHF channel in Illopolis, Ill., to serve Springfield (R. 948-49, 953-54); Channel 16 of Rhode Island's request to allocate a VHF channel to Westerly, Rhode Island, in order to serve Providence (R. 950, 953-54); South Central Broadcasting Corp.'s request that a VHF channel be allocated to Knoxville, Tenn. and Columbia, S. C. (*Memorandum Opinion and Order* adopted Nov. 10, 1955, 13 Pike & Fischer Radio Reg. 1522); Bakersfield Broadcasting Co.'s request that a VHF channel be allocated to Bakersfield, Cal. (*Ibid.*); Supreme Broadcasting Co., Inc.'s request that a VHF channel be allocated to New Orleans (*Ibid.*)

an area by allocation. Commissioner Bartley apparently meant that brute force had been used to allocate the channel. He also stated that channel 10 would "be the death knell of multiple UHF services in the area; consequently, less instead of more service to the public" (Ibid.).

Commissioner Webster, who concurred with the majority on the postponement of consideration of the deintermixture requests, did not do so on Channel 10 because that action was "so obviously inconsistent" with the postponement (R. 960).

Van Curler petitioned the court below for review of the Commission's order allocating Channel 10, its order denying Van Curler's deintermixture proposal, and its order denying a reopening of the record. The jurisdictional bases for the petition for review were Section 402(a) of the Communications Act of 1934, as amended [47 U.S.C. § 402(a)], Section 4 of the Judicial Review Act of 1950 [5 U.S.C. § 1034] and Section 10 of the Administrative Procedure Act [5 U.S.C. § 1009]. See *United States* v. *Storer Broadcasting Company,* U.S. , 76 S. Ct. 763. The court below, after consideration *en banc,* affirmed the Commission's actions. The opinions of Judge Prettyman for the majority, and of Judge Bazelon for himself and Judge Edgerton dissenting, appear in the appendix.

REASONS FOR GRANTING THE WRIT

This case presents three novel questions which are important to the administrative exercise of rule-making functions under Section 4 of the Administrative Procedure Act [5 U.S.C. § 1003]. The issue basic to each of these questions is the extent to which

Section 4 makes applicable to rule-making proceedings standards of fairness which this Court has repeatedly held must be followed in adjudicatory hearings.

For the protection of interested parties and the public, Section 4 established certain basic essentials for "public" rule-making including (1) public notice of proposed new rules; (2) a right of public participation in the proceedings through submission of "written data, views or argument"; (3) a requirement that the agency consider all relevant matter so presented; and (4) a further requirement that the agency give a statement of the "basis and purpose" of each new rule issued. These basic essentials are particularly important where, as here, a rule-making decision can have the effect of destroying an existing business concern. In the present case, the Commission purported to comply fully with the requirements of the Administrative Procedure Act. By formal notice it instituted the "public" rule-making procedure outlined in Section 4. It permitted interested parties an opportunity to submit written comments, and it established a cut-off date for such filings. It afforded oral argument, and it stated that only parties of record could participate. Then, long after the case was submitted, it gave CBS, an outsider to the proceedings up to that date, the opportunity to file secret comments and make an *ex parte* argument. It made a ruling in favor of the position urged by CBS while at the same time postponing consideration of another pending rule-making proposal which, because it was inconsistent with the CBS proposals, could not be granted at a later date without a reversal of the action taken on the CBS proposals. To cap the climax, it ignored the principal economic problems which it had posed as an issue in the rule-making and to which all parties had directed their

comments. Instead, it issued a general statement that its action would, by providing for a future television station in Vail Mills, a community of 250 persons, "bring additional television service to a significant number of people" (R. 954).

The issues in this case are of substantial importance not only in the television industry but also in the general administration of the Administrative Procedure Act. The issues so impressed the Court of Appeals that it heard argument *en banc* on its own motion. The issues divided the Court of Appeals 7-2. The Commission itself was divided 4-3 on putting in Channel 10. Moreover, by a second 4-3 vote, the Commission has since proposed to take Channel 10 out again.[1]

The decision of the court below constitutes a ruling that the provisions of Section 4 of the Administrative Procedure Act do not impose upon administrative agencies promulgating rules the most rudimentary requirements of fairness applicable in adjudicatory proceedings. The Court of Appeals for the District of Columbia Circuit is the principal court to which problems of administrative procedure are presented. An important pronouncement by that court *en banc* which relieves administrative agencies of compliance with standards of fairness is clearly a proper subject of review by this Court.

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[1] On June 26, 1956, the Commission adopted a second report on deintermixture which proposes, for industry comments, to eliminate one of two VHF channels in those predominantly UHF areas where one VHF station is in operation and a second VHF channel has been allocated but the second station has not yet been constructed. By a 4-3 vote the Commission proposes to follow this formula in the Albany area and delete Channel 10. Whether and when the Commission will take final action on this tentative proposal is unknown. *In re Amendment of Part 3 of the Commission's Rules and Regulations Governing Television Broadcast Stations,* 13 Pike & Fischer Radio Reg., pp. 1571, 1583.

Question 1

The first of the questions presented by petitioner is whether, in a public rule-making proceeding where participation by interested parties is limited to those who have filed appearances, an agency may, without notice to these parties, permit secret intervention and afford *in camera* argument to other parties. The decision of the court below upholds such a procedure. It sanctions the Commission's *ex parte* conference with CBS in violation of the procedural ground rules established by the Commission itself for this very case.

1. The decision below is important first because it authorizes the substantial nullification of the new right of public participation in rule-making proceedings established by Section 4(b) of the Administrative Procedure Act. Section 4(b) created, for interested parties, a right to "an opportunity to participate" in rule making "through submission of written data, views or argument." [5 U.S.C. § 1003(b)]. Congress intended, in enacting Section 4(b), to erect procedural safeguards around the administrative rule-making process which did not surround the legislative process because of the substantial differences between administrative rule making and legislative statute making.[1]

Section 4(b) guarantees that parties to rule-making proceedings shall have, at a minimum, a right to submit evidence in writing. Just as a right to a hearing is meaningless if the judgment is based upon secret

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[1] *Administrative Procedure Act, Legislative History*, Sen. Doc. 248, 79th Cong., pp. 19-20 (1946). For a pre-Administrative Procedure Act rule-making case requiring only "legislative" safeguards, see *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294.

evidence presented during *ex parte* argument, so the right to file a written statement is nugatory if the decision is founded upon hidden data submitted at an *in camera* meeting. The right to file a written statement "includes the right to file a meaningful statement, one based on all the facts in the file and made with awareness of the recommendations and arguments to be countered." *Gonzales* v. *United States,* 348 U.S. 407, 415. Except for the fact that *Gonzales* involved adjudication and not rule-making, its holding would be in direct conflict with the decision below.

2. The decision of the court below is important secondly because it sanctions an agency's non-observance of its own procedural ground rules. In so doing, the decision departs from precedents established by this Court in cases involving adjudication. *E.g., U. S. ex rel. Bilokumsky* v. *Tod,* 263 U.S. 149, 155; *Bridges* v. *Wixon,* 326 U.S. 135; *United States ex rel. Accardi* v. *Shaughnessy,* 347 U.S. 260, 265, 268. These cases hold that properly issued procedural regulations have the "force and effect of law" (*Accardi, supra*); that a person subject to the administrative process "is legally entitled to insist upon the observance of rules promulgated by the . . . [agency] pursuant to law" (*Bilokumsky, supra*); and that such a person must be "afforded that due process required by the regulations in such proceedings" (*Accardi, supra*).

The Commission failed to meet these requirements. Having embarked upon a formal procedure in which the views of all parties were required to be placed upon the public record, the Commission was bound by that procedure, at least until public notice of a different procedure was given. Having closed the record as far as the parties were concerned, the Commission could not secretly open it for CBS. To do so was to violate

its own precedural orders and to do violence to fundamental notions of fair play.

3. The court below upheld this procedure because it found that CBS' "calls and conversations were in regard to the nationwide intermixture problem, concerning which the Commission was seeking all sorts of advice and information preparatory to setting up a general nationwide rule-making proceeding to deal with intermixture" (App. p. 5a). This finding was based upon statements in the Commission's opinion indicating that CBS' comments "related to possible national reallocation schemes" and that they did not "pertain to the merits of granting or denying the particular petitions before us, except as part of . . . a nationwide approach" (R. 955). But petitioner had alleged, and the Commission has never denied, that CBS opposed each of petitioner's specific proposals for Albany-Troy-Schenectady at this "unprecedented" two-and-one-half hour, *in camera* meeting with the Commission (R. 929, 930, 933). If this was so, it was clearly incorrect to say that the CBS proposals did not "pertain to" the Channel 10 petition or petitioner's counter-proposal. Whether or not the CBS presentation also pertained to some other proceeding, as the Commission stated and the Court of Appeals thought, seems irrelevant. Van Curler was prejudiced in any event.

The Commission's own opinion acknowledges that *ex parte* representations were in fact made to it (R. 955). Commissioner Hyde, dissenting, stated that material "*de hors* the record, *had been considered.* . . . [T]o the extent that information outside of the record played a part in the majority decision, the participants in the formal proceedings have not had a fair opportunity to be apprised of the existence of such material,

let alone meet or test the validity thereof." (R. 957, emphasis added). It thus seems clear that the CBS comments were considered and did have an effect on the proceedings. The extent of that effect is best judged by the inconsistency of the Commission's actions involving Vail Mills and Albany with its simultaneous actions involving other areas. (See pp. 8-9, *supra*)

The Commission's procedure quite clearly did violence to fundamental notions of fair play, as well as to its own procedural ground rules and Section 4(b) of the Administrative Procedure Act. If the question were not novel because rule-making and not adjudication is involved, the sanction to this procedure given by the court below would call for an exercise by this Court of its power of supervision. In any event, the matter is of obvious importance.

Question 2

The second question presented by this petition is also of importance to the administrative exercise of rule-making functions under Section 4 of the Administrative Procedure Act. The question is whether an agency may grant the rule-making proposal of one party while, at the same time, postponing consideration of the merits of the mutually exclusive counter-proposal of another party. In this case, the Commission granted Hudson Valley's petition to allocate VHF Channel 10 while postponing consideration of the merits of petitioner's request to "deintermix" the area by eliminating all the VHF allocations and placing all commercial stations on competitively equal UHF channels.

This Court's *Ashbacker* decision [*Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327] stands for the proposition that, in an adjudicatory proceeding, it is unfair to postpone consideration of one application for a new

station while at the same time granting a mutually exclusive application. *Ashbacker* holds that where there are inconsistent proposals, it is arbitrary to grant one and then impose upon the other the burden of justifying the displacement of the first. This rule of concurrent consideration is based upon the idea that an agency which has decided an issue one way before hearing the contentions of the other side cannot give that side a really fair hearing on the issue at a later date because its mind has already been made up.

The issue presented by this petition is whether such a rule of elemental fairness is applicable to rule-making proceedings as well as to adjudicatory ones. The majority decision below does not discuss the point. It is however the principal argument of the two dissenters, Judges Edgerton and Bazelon. Moreover, the Commission itself has recognized the principle in other cases. For example, when it recently considered three rule-making petitions involving inconsistent proposals for channel reallocations, the Commission stated that "the three petitions are therefore mutually exclusive and *must* be considered together".[1]

This is an important question of federal law which has not been, but should be, settled by this Court.

Question 3

The third of the questions presented by this petition is also one which looms large in the interpretation of the rule-making provisions of the Administrative Procedure Act. It involves the requirement of Section 4(b) of that Act that an agency give a "concise general statement" of the "basis and purpose" of a rule

[1] *In re Amendment of Section 3.606, Table of Assignments, Rules Governing Television Broadcast Stations* (York, Lancaster, etc., Pennsylvania), Notice of Further Proposed Rule Making released July 23, 1956 in FCC Do. No. 11499 (emphasis added).

when it is promulgated. The court below found this requirement satisfied by vague generalities which indicated little more than that a majority of the Commission thought that the allocation of Channel 10 would provide "additional television service to a significant number of people" (R. 954). Absent was a conclusion in the language of any pertinent Communications Act standard. Absent was an indication as to which of several such standards governed this case. Absent was a determination of the basic factual question which the Commission itself had asked during the proceedings: whether the allocation of a VHF channel would prevent or hinder the ultimate utilization of the UHF channels already allocated. Indeed, the Commission's opinion does not even contain a conclusion that the public interest would be served by its action.

Whether such a statement meets the test of Section 4(b) of the Administrative Procedure Act is clearly of paramount importance to all agencies exercising rule-making powers under that Act. If a rule can be promulgated with the simple statement that a "significant number of people" would be served by its promulgation—without language showing that the pertinent test of the agency's statute has been met and without a resolution of the basic factual issues upon which the agency requested comments—then the agency's job of justifying its action becomes immeasurably easier, and the Court's job of reviewing that action becomes immeasurably more difficult. Judging by the legislative history which we will set forth in a moment, such a result was not intended by Congress when it enacted the Administrative Procedure Act.[1]

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[1] *Cf. Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-91, followed in *Radio Corp. of America* v. *United States*, 341 U.S. 412, 414-415, 420.

Nor would it seem to follow from this Court's interpretation of similar statutory provisions. *E.g., United States* v. *Baltimore & O. R. Co.,* 293 U.S. 454, discussed *infra.*

1. The legislative history is clear that more is required by Section 4(b) than the ultimate conclusion that a significant number of people will be served by the issuance of a rule. The Senate Judiciary Committee Print of June 1945 which contained the relevant language of Section 4(b) had this to say by way of explanation[1] (emphasis added):

> "The statement of the 'basis and purpose' of rules issued will vary with the rule, but in any case should be *fully explanatory* of the *complete factual and legal basis* as well as the real object or objects sought."

The later Report of the House Committee on the Judiciary is to the same effect[2] (emphasis added):

> "The agency must keep a record and analyze and consider all relevant matter presented prior to the issuance of rules. The required statement of the basis and purpose of rules issued should not only *relate to the data so presented* but *with reasonable fullness explain the actual basis and objectives* of the rule."

The Congress thus intended that "basis and purpose" mean, at a minimum, a "fully explanatory" statement giving factual conclusions which relate to the relevant data presented by interested parties and

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[1] Administrative Procedure Act, Legislative History, Sen. Doc. 248, 79th Cong., 2d Sess., p. 20 (1946).

[2] *Id.* at p. 259. The Senate Committee report is almost identical to the House Report. *Id.* at p. 201.

legal conclusions which relate to the statutory bases for agency action.

2. This is no more than this Court has required of agencies promulgating rules under comparable statutes prior to the enactment of the Administrative Procedure Act. Typical of such decisions is the *B & O* case.[1] There the Court had before it an Interstate Commerce Commission order requiring railroads to equip locomotives with power-operated reverse gear. The relevant statute authorized the ICC to issue orders requiring equipment changes to remove "unnecessary peril to life and limb."

Finding the ICC's discussion of this statutory test ambiguous, Mr. Justice Brandeis, for a unanimous court, stated (293 U.S. at 463-65):

> "[W]hether the use of any or all types of steam locomotives 'equipped with hand reverse gear as compared with power reverse gear causes unnecessary peril to life or limb' is left entirely to inference. This complete absence of 'the basic or essential findings required to support the Commission's order' renders it void. . . .
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> * * *
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> It is true that formal and precise findings are not required under section 14(1) of the Interstate Commerce Act (49 USCA § 14 (1)), which declares that the report 'shall state the conclusions of the commission, together with its decision.' . . .

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[1] *United States* v. *Baltimore & O. R. Co.*, 293 U.S. 454; see also *Thomas Paper Stock Co.* v. *Porter*, 328 U.S. 50. The doctrine of the *B. & O.* case has been reaffirmed in numerous decisions. See, e.g., *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475; *City of Yonkers* v. *United States*, 320 U.S. 685; *Colorado-Wyoming Gas Co.* v. *F.P.C.*, 324 U.S. 626; *Secretary of Agriculture* v. *United States*, ... U.S. ...., 76 S. Ct. 244.

> That provision relieves the Commission from making comprehensive findings of fact. . . . But section 14(1) does not remove the necessity of making, where orders are subject to judicial review, quasi jurisdictional findings essential to their constitutional or statutory validity.'"[1]

3. With these general principles in mind, let us turn again to the situation at hand. As the court below recognized, the relevant statutory criteria in this case and the probable legal bases for the Commission's allocation were one or both of two sections of the Communications Act, Sections 307(b) and 303(g). Section 307(b) directs the Commission, in allocating "frequencies," to "provide a fair, efficient and equitable distribution of radio service" among the several states and communities of the nation. Section 303(g) requires that the Commission "encourage the larger and more effective use of radio in the public interest."

Nowhere in its opinion does the Commission state whether either or both of these tests have, in its judg-

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[1] The principle enunciated in the *B. & O.* case, *supra,* received general statement in both of the later *Chenery* cases:

> ". . . [T]he courts cannot exercise their duty of review unless they are advised of the consideration underlying the action under review . . . . [T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted *be clearly disclosed and adequately sustained.*" *SEC* v. *Chenery Corp.,* 318 U.S. 80, 94 (emphasis added).
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> "If the administrative action is to be tested by the *basis* upon which it purports to rest, *that basis must be set forth with such clarity as to be understandable.* It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." *SEC* v. *Chenery Corp.,* 332 U.S. 194, 196-197 (emphasis added).

ment, been satisfied. That there was substantial doubt that either test would be served by the allocation is clear. Petitioner contended, and submitted evidence to support its contention, that the allocation of a VHF channel would preclude the utilization of various UHF channels which the Commission had previously allocated to Albany, Schenectady, Troy, Gloversville, Amsterdam, Glens Falls, New York; and to Adams, Massachusetts (R. 385, 430, 432-33, 12-17, 218-19). If this were so, Gloversville, Glens Falls, Amsterdam and Adams would never be able to have any television station of their own because UHF channels were the only kind that they were allocated. Thus they would not receive the "equitable distribution of radio service" promised them by Section 307(b). And, the larger cities, Albany, Schenectady and Troy, would have fewer stations and therefore a less equitable distribution. Moreover, if the allocation actually resulted in fewer rather than more stations, the Commission's action would certainly not "encourage the larger and more effective use of radio in the public interest" as required by Section 303(g).

That the allocation of a VHF channel to the area would destroy all opportunity for successful operation of UHF stations was petitioner's principal argument to the Commission (R. 12-17, 218-19, 385). The Commission itself recognized the danger in its rule-making notice by requesting factual information from the parties concerning the effect of the allocation of a VHF channel on the present and potential UHF stations (R. 313-14). Even Hudson Valley, the proponent of Channel 10, admitted that the "maximum number of competing stations would result" if there were no VHF allocations in the area (R. 358).

So far as can be seen from the Commission's opinion, these matters were never considered or resolved. The full text of that part of the opinion which concerns the allocation of Channel 10 is set out above (*supra,* pp. 7-8). In summary, the Commission first concluded that the proposal to allocate Channel 10 conformed to its rules concerning amendments to its table of television assignments and met various distance and other technical requirements designed to prevent interference, etc. (R. 954). The result of these conclusions was only to make the Channel 10 proposal eligible for consideration on its merits. Secondly, the Commission drew several general conclusions to the effect that Channel 10 would bring additional service to a "significant" number of people (R. 954). When the Commission's opinion is analyzed, these two general propositions are all that it really contains.

The Commission's opinion is so vague that it is impossible to ascertain what the "factual and legal basis"[1] for the allocation of Channel 10 was. It cannot be determined from the opinion whether the factual basis was that (1) the Commission was unaware that the channel posed any threat whatever to the UHF stations; or (2) the Commission disagreed with petitioner's showing that UHF service would be destroyed by Channel 10 and concluded that the UHF stations would continue operating as before; or (3) the Commission decided that only one of the three existing UHF stations would cease operation if Channel 10 were allocated, and that one VHF station was better than one UHF; or (4) the Commission concluded that

[1] This quotation is taken from the legislative history, *supra,* p. 19.

the UHF stations were already in such difficulty without Channel 10 that none were likely to survive even if the status quo were retained, and that one reasonably sure VHF station was better than three doubtful UHF stations.

The legal basis for the Commission's action is similarly hidden. Absent is a conclusion in the language of any pertinent Communications Act standard, or even any indication as to which of two or more standards governed this case. This Court has no way to determine whether the Commission based its allocation on Sections 303(g), 307(b) or some other standard.

By upholding the Commission's order, the court below sanctioned administrative laxness which Congress had intended to prevent. If an administrator need say no more in justification for a new rule than that it would serve the interests of a significant number of people, then the requirement of Section 4(b) of the Administrative Procedure Act means very little. Congressional insistence upon the "basis and purpose" of a rule was intended as a safeguard against arbitrary action on the theory that one who must give reasons for his actions is more likely to take reasonable actions. The effect of the decision below is to remove most of the content from this requirement. The decision below is therefore of paramount importance and should be reviewed by this Court.

CONCLUSION

The three questions here presented are all of paramount importance to the administrative exercise of rule-making functions under Section 4 of the Administrative Procedure Act. An issue basic to each of the questions is whether the most rudimentary require-

ments of a fair hearing are applicable to a Section 4 rule-making proceeding. This issue has never been decided by this Court.

The court below found this case to be of sufficient importance to justify *en banc* consideration which it ordered on its own motion. That same importance would seem to justify the granting of certiorari.

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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October 8, 1956

APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12987

VAN CURLER BROADCASTING CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

HUDSON VALLEY BROADCASTING COMPANY, INC., INTERVENOR

No. 12989

GREYLOCK BROADCASTING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

HUDSON VALLEY BROADCASTING COMPANY, INC., INTERVENOR

On Petitions for Review of Order of the Federal Communications Commission

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Decided July 9, 1956

Mr. Harry M. Plotkin, with whom *Mr. Paul A. Porter* was on the brief, for petitioner in No. 12987. *Messrs. L. Reed Miller* and *George Bunn* also entered appearances for petitioner in No. 12987.

Mr. Vernon L. Wilkinson, with whom *Mr. James A. McKenna, Jr.,* was on the brief, for petitioner in No. 12989.

Mr. Daniel R. Ohlbaum, Counsel, Federal Communications Commission, with whom *Mr. Stanley N. Barnes,* As-

sistant Attorney General, *Messrs. Daniel M. Friedman* and *William J. Lamont,* Attorneys, Department of Justice, *Mr. Warren E. Baker,* General Counsel, Federal Communications Commission, and *Mr. Richard A. Solomon,* Assistant General Counsel, Federal Communications Commission, were on the brief, for respondents.

Mr. D. M. Patrick, with whom *Mr. Stanley S. Harris* was on the brief, for intervenor.

Before EDGERTON, Chief Judge, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, Circuit Judges, sitting *en banc.*

PRETTYMAN, *Circuit Judge:* This matter is closely akin to the cases known here as the *Coastal Bend* cases,[1] decided June 7, 1956. The factual background recited in the opinion in those cases need not be repeated here. There is a difference. In those cases the petitioners-appellants were UHF licensees complaining of pending grants of VHF licenses in their areas. In the present cases the petitioners, also UHF licensees, are complaining of the allocation of a VHF channel (Channel 10) to a community in their area. The *Coastal Bend* cases concerned licenses; the present cases concern a channel assignment.

Upon a preliminary consideration of Greylock's motion to that effect we stayed the Commission's order so as to preserve, in view of the patently impending damage, the existing status of affairs until the controversy could be briefed and argued and considered by us in due course.[2]

Petitioner Greylock owns and operates a UHF television station at North Adams, Massachusetts, with its transmitter on Mount Greylock in Massachusetts, to the

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[1] — U.S. App. D.C. —, 234 F.2d 686.

[2] See opinion on Intervenor's Motion to Reconsider and Vacate Stay, Greylock Broadcasting Co. v. United States and Federal Communications Comm'n, — U.S. App. D.C. —, 231 F.2d 748 (1956). [This opinion is Appendix B to this petition]

east of the Albany-Troy-Schenectady area. Petitioner Van Curler owns a UHF license for operation in Albany but was not operating at the time of the proceedings in this court. Intervenor Hudson Valley owns and operates a UHF station in Albany. It petitioned the Commission to amend its Table of Assignments of television channels so as to assign Channel 10 to a small community, Vail Mills, northwest of Schenectady. The requested assignment met the Commission's engineering requirements as to distances, etc.[3] After prolonged rule-making proceedings the Commission issued the order here under review, granting the allocation.

The Sixth Report of the Commission,[4] which is the presently outstanding basis for the allocation of television channels, was an amendment, pursuant to a rule-making proceeding, of Section 3.606 of the Commission's Rules and Regulations. It provided a Table of Assignments,[5] specifying channels and their community locations, and contained a long explanation of the principles governing the Assignment Table[6] and explanatory provisions in respect to changes in the Table.[7] The Commission specifically called attention to the fact that possible assignments on Channels 2-65 had not been made in the Table,[8] announced that it would follow its assignment spacing requirements in future proceedings dealing with amendments to the Table, and made clear that persons wishing to apply for a channel not specified in the Table would be required to secure an amendment to the Table

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[3] Sec. 3.610, 47 C.F.R. § 3.610, 1 PIKE & FISCHER RADIO REG. 53:616.

[4] Adopted April 11, 1952, 1 PIKE & FISCHER RADIO REG. 91:599 *et seq.*

[5] Report §§ 248-982.

[6] Report §§ 63-200.

[7] Report §§ 201-214.

[8] Report § 29.

through appropriate rule-making proceedings before submitting an application for a license.[9] Thus the Sixth Report contemplated and provided for not only a present Table of Assignments but also future amendments to that Table by the assignment of additional channels to communities under specified rules and policies.

The procedure outlined in the Sixth Report was followed in the present matter. An application for a rule-making proceeding to amend the Table of Assignments by the additional assignment of Channel 10 to Vail Mills was made, the procedure prescribed by the Administrative Procedure Act for rule-making was followed, and the Table of Assignments was amended by the order here under review.

In its report and order the Commission recited that the proposed assignment was consistent with its rules and the principles of its present television allocations, and that it would not be justified in withholding action which would bring additional service to a significant number of people. It said Channel 10 at Vail Mills would represent a second service to an appreciable percentage of the families in the area and a first service to a significant number of families. Since this was a rule-making and not an adjudicatory proceeding, the Commission was required to make merely "a concise general statement of their [*i.e.*, the rules'] basis and purpose."[10]

The grant of a license on the newly assigned channel is not before us, no application for a license having even been filed as yet, so far as this record shows. The matter before us is solely a rule-making.

Since the Commission did not summarily depart from established principles or program, but on the contrary

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[9] Report § 201.

[10] Sec. 4(b), Administrative Procedure Act, 60 STAT. 238 (1946), 5 U.S.C.A. § 1003(b).

followed a course clearly anticipated and provided for in its basic Sixth Report, its action can in no sense be deemed arbitrary or capricious. Since all procedural requirements as to rule-making proceedings were met, no defect in the order appears in that respect. The conclusion reached by the Commission is clearly stated. The basis and purpose of the order are ample and understandably, even though succinctly, stated and are within the considerations prescribed by the statute as criteria for Commission action.[11] The order is also consistent with the provisions of the act dealing with the distribution of licenses.[12] The given reasons are rational and support the conclusion. Having reached the foregoing conclusions the function of the court is at an end in a case such as this.

Petitioners urge that the action of the Commission is invalid because during the course of this proceeding the Commission received and listened to, *ex parte*, representatives of the Columbia Broadcasting System. But it appears that these calls and conversations were in regard to the nation-wide intermixture problem, concerning which the Commission was seeking all sorts of advice and information preparatory to setting up a general nation-wide rule-making proceeding to deal with intermixture. We find nothing improper or erroneous in the Commission's consideration of these interviews as depicted in this record.

Affirmed.

BAZELON, *Circuit Judge*, dissenting: In denying intervenor's motion to reconsider and vacate the stay we had granted herein, we pointed out the potential public injury which could result from authorizing the Channel 10 "drop-in" before the determination of the deintermixture

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[11] 48 STAT. 1082 (1934), as amended, 47 U.S.C.A. § 303(g) and (r).

[12] 48 STAT. 1083 (1934), as amended, 47 U.S.C.A. § 307(b).

proceeding.[1] We said: "Greylock urges, and we agree, that every interest of fair distribution will be served by postponing the allocation until the Commission decides, in the proceeding already under way, whether there is to be such an allocation to this area."[2] And we concluded:

"We find specifically that the present allocation of Channel 10 to the Vail Mills area pending the outcome of the deintermixture proceeding would impose upon Greylock losses which it could not recover, and that this threat of loss is not offset by any vantage to the public interest."[3]

I know of no changed circumstance which impels abandonment of that conclusion.

In *Coastal Bend* we held that, whatever might be the probability that the 1952 station allocations would be deintermixed by the Commission in the current rule-making proceedings, "we clearly should not compel the Commission to delay existing adjudicatory proceedings conducted in accordance with the statute and valid regulations thereunder in order to await the outcome of rule-making pro-

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[1] "No public interest is served by an immediate allocation. Under present allocations the area is predominently—seven to one—UHF. Only one VHF station is operating, and some of the national networks in their competition with one another must use one of the two UHF stations now in operation. The public has bought and is buying its receiving sets in the light of those facts. If the Commission finally decides to leave the area as it is now, the public will buy, or retain, its sets in light of that fact. If the Commission decides to allocate permanently another VHF channel, it seems to be agreed that the UHF stations will fold. The public will thereafter be governed by that circumstance. If a VHF allocation is made temporarily, pending consideration of its permanency, complete public uncertainty is created; both owners and buyers of sets would be thrown into a whirlpool of sales pressures, possibly to no permanent purpose. We see no public benefit in such a completely uncertain temporary arrangement." Greylock Broadcasting Co. v. United States, — U.S. App. D.C. —, —, 231 F.2d 748, 750 (1956).

[2] *Ibid.*

[3] — U.S. App. D.C. at —, 231 F.2d at 751.

ceedings.'"[4] We said that "an adjudication that conforms to the 1952 allocation is valid" and that the public interest factors being urged against the adjudication had necessarily been determined by the Commission in designing the allocation.[5]

The case now before us is significantly different from *Coastal Bend.* The issue it presents is not whether we should prevent the Commission from adhering to the 1952 allocation table pending the outcome of the general deintermixture proceeding; it is rather whether we should permit the Commission to make *ad hoc* departures from its allocation table in a manner which pre-judges issues pending for determination in the general deintermixture proceeding. Whereas the public interest factors urged by the *Coastal Bend* petitioners had been determined against them in the adoption of the allocations, those now urged by these petitioners have never been heard or judged, but are now being determined (in practical effect) by way of a departure from the allocations.[6]

This predetermination of petitioners' case violates the spirit of *Ashbacker Radio Co.* v. *Federal Communications*

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[4] — U.S. App. D.C. —, 234 F.2d 686 (Nos. 13034 et al., decided June 7, 1956), slip opinion, p. 9.

[5] *Ibid.*

[6] Since the argument of this case, the Commission has considered these public interest factors and has promulgated a Report and Order (Docket No. 11532, June 26, 1956) concluding, at least tentatively, that these factors favor the position here asserted by petitioners. The Commission also issued a Notice of Proposed Rulemaking (Docket No. 17751, June 26, 1956), proposing, in implementation of the aforesaid Report and Order, to delete Channel 10 from Vail Mills. Following the promulgation of these documents, petitioner Van Curler moved for leave to add them to the record herein and to file additional briefs and make further argument based upon what it considered to be the Commission's change of position. The Court has denied that motion, apparently upon the ground that the Commission's tentative determination that the allocation of Channel 10 to Vail Mills is against the public interest is of no weight in the court's determination of whether that allocation should be sustained. From that action I dissent.

Commission, 326 U.S. 327 (1945). That the proceeding referred to in that case was adjudicatory while this one is rule-making does not alter the case. The Commission necessarily makes some of its determinations in rule-making rather than adjudicatory proceedings. We have specifically upheld its power to determine channel allocations by rule-making. *Peoples Broadcasting Co.* v. *United States,* 93 U.S. App. D.C. 78, 209 F.2d 286 (1955); and *Logansport Broadcasting Corp.* v. *United States,* 93 U.S. App. D.C. 342, 210 F.2d 24 (1954). In so doing, we said that such a rule-making proceeding was not to be treated as an adjudicatory proceeding "merely because the rule adopted may be determinative of specific situations arising in the future." *Logansport Broadcasting Corp.* v. *United States,* 93 U.S. App. D.C. at 345, 210 F.2d at 27. A hall-mark of rule-making, we pointed out, was "future rather than a present or past effect." *Ibid.* It would be most inaccurate to say the action here complained of "merely . . . may be determinative" of a specific situation. It is avowedly directed at one specific situation. Nor can it be said that the effect of the action is only future, for it will inevitably have a present impact. The conflict between petitioners and intervenor here is whether the Albany-Troy-Schenectady area should become all-UHF, as petitioners desire, or more-VHF than it is, as intervenor desires. The Commission's action here complained of makes the area more-VHF. The networks' contracts to supply programs to the stations in the area will immediately be affected by the knowledge that there is to be a second VHF station. Furthermore, since a second VHF is likely to destroy the existing UHF stations, viewers, in buying their sets will "be governed by that circumstance."[7] *Ashbacker* holds that, where there are conflicting proposals, it is unfair to grant one and then impose upon the other the burden of justifying its displacement. That rule, in my judgment, is applic-

[7] *Supra* note 1.

able to the proceeding in this case, whether it be called rule-making or adjudicatory, for *Ashbacker* will not tolerate procedure which "may satisfy the strict letter of the law but certainly not its spirit or intent." 326 U.S. at 331. "Legal theory is one thing. But the practicalities are different." *Id.* at 332.

If the majority means to suggest that the Channel 10 "drop-in" was not a departure from, but rather an implementation of the table of allocations, I cannot agree. The provision in the Sixth Report and Order for amendment of allocations provides no particular support for such a suggestion. Any administrative policy may be changed, whether or not there is a specific provision to that effect. Articulating the possibility of amendment does not support a theory that amendment is adherence rather than departure.

EDGERTON, *Chief Judge,* concurs in this dissent except with respect to petitioner's motion to supplement the record, and for leave to file additional briefs and make further argument.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12989

GREYLOCK BROADCASTING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

HUDSON VALLEY BROADCASTING COMPANY, INC., INTERVENOR

On Motion to Reconsider and Vacate Stay

Filed February 14, 1956

Before PRETTYMAN, BAZELON and DANAHER, Circuit Judges.

PRETTYMAN, *Circuit Judge:* On December 9, 1955, this court stayed that part of an order of the Federal Communications Commission which would have allocated television Channel 10 to Vail Mills, New York. The intervening broadcaster (Hudson Valley Broadcasting Company, Inc. now moves that we reconsider and vacate the stay. Its ground for so moving is that the action of the court was under Section 9(b) of the Judicial Review Act, 64 STAT. 1131 (1950), 5 U.S.C. § 1039(b); that that section requires as a premise for a stay a specific finding that irreparable damage would otherwise result to the petitioner (*i.e.*, Greylock Broadcasting Company); that this court made no such finding; and that no such finding is possible upon the evidence of record.

The controversy revolves about the UHF-VHF television problem presently before the Commission. UHF

broadcasters have experienced grave difficulties of an economic sort due to the wide ownership by the public of VHF receiving sets and the costs of either converting or of adding UHF receivers. Thus, where both types of transmission are in use in an area, the network services and the consequent greater proportion of the remunerative commercial contracts have been going to the VHF stations. The situation has developed to such a point that the Commission instituted a rule-making proceeding, nationwide in scope, to consider, among other alternatives, the desirability of the "deintermixture" of the two services. The broad meaning of the deintermixture proposal is the desirability of so redistributing allocations as to eliminate or lessen the competition between the two types of service in specified areas. That proceeding is now pending before the Commission, and the stay here involved does not impede or interfere with its progress in any manner whatsoever.

The area involved here is the Albany-Schenectady-Troy area in New York. Presently, under the Sixth Report of the Commission, seven UHF and one VHF commercial television channels are allocated to the area. Our intervenor, Hudson Valley, is now the owner of a UHF license. It calculated that under the Commission's engineering regulations as to spaces, distances, etc., another VHF allocation (Channel 10) could be made to the area if the station were located at Vail Mills, a small community about twenty miles northwest of Schenectady. It made a proposal to that effect to the Commission. At about the same time proposals and counter-proposals for the deintermixture of the area were made.

The Commission, by a four-to-three vote, granted the allocation of Channel 10 to Vail Mills but put the deintermixture problem of the area into the nationwide rulemaking proceeding. Greylock and the Van Curler Broadcasting Corporation, both UHF operators in the

area, protested and then appealed. We stayed the allocation of Channel 10 pending disposition of Greylock's petition for review.

The Sixth Report and Order of the Commission, adopted April 11, 1952, was the final report in proceedings instituted in 1948. It established a nationwide table of assignments for television frequencies and made separate "final assignments" of channels to the various communities in the country. The allocation of Channel 10 (VHF) to this area is not in the Sixth Report or in any allocation heretofore made. It is a new allocation, a "drop-in", permissible under engineering limitations but not heretofore allowed. Greylock avers, with proffer of proof, that if this second VHF station goes into operation in the area, under the auspices and with the contracts presently available for such a station, it (Greylock) will be forced off the air. Its averment is borne out by the common experience of others. As we understand it, no one disputes the dire effects upon UHF operations of competing VHF services in the present state of the art.

The mere allocation of the channel to the area is not, of course, the award of a license; it is indeed a long way from that conclusion. But it is a first step. The new allocation poses in practical and realistic form a threat to the continuance of the UHF stations. If the channel remains thus allocated a license on it will surely be awarded to somebody sometime. It is quite clear that, if the new allocation of a VHF station is made temporarily, all of Greylock's plans, programs and commitments, both for revenue and for expenditure, must be upon a conditional basis; its future is undetermined. Immediately the new allocation is made and the new station becomes a close possibility, Greylock's operation takes on a conditional character. Obviously operation upon such a basis causes losses in comparison to operation absent such pending contingencies; and that such losses cannot

be recouped is also obvious. It is clear from the material offered by Greylock that if a license is open for award upon the new channel it (Greylock) will either have to acquire that license (by award or by purchase) or be driven off the air. Of course the mere pendency of the proposed allocation poses some part of the threat to Greylock, but the accomplishment of the allocation, making the presence of the available channel an accomplished fact, greatly magnifies those incipient losses.

It is noteworthy that on the same day it granted the Vail Mills "drop-in" the Commission denied all other requests for changes in the present table of assignments pending the rule-making deintermixture determination.

Hudson Valley and the Commission say that Greylock's choice in the presence of the allocation is merely a matter of business judgment. But this sort of gun-to-the-head choice is not what is customarily known as the exercise of business judgment.

A question presented by Greylock's petition for review is whether it (Greylock) was entitled to a hearing before finalization of the allocation of Channel 10 to this area; that is, whether under presently known facts an operating UHF station is entitled to a hearing before the allocation of a new VHF channel. As presented the question involves due process considerations. The question posed is a substantial one. We intimate no view whatever upon the matter. Our present concern is merely that the question is substantial. The making of the allocation now, while the question whether it is ultimately to remain is under formal consideration by the Commission, serves no useful purpose, so far as we can ascertain from the material before us. The Commission says it will now allocate the channel to the area and hereafter decide whether to leave it there. Greylock urges, and we agree, that every interest of fair distribution will be served by postponing the allocation until the Commission decides, in the pro-

ceeding already under way, whether there is to be such an allocation to this area.

No public interest is served by an immediate allocation. Under present allocations the area is predominently—seven to one—UHF. Only one VHF station is operating, and some of the national networks in their competition with one another must use one of the two UHF stations now in operation. The public has bought and is buying its receiving sets in the light of those facts. If the Commission finally decides to leave the area as it is now, the public will buy, or retain, its sets in light of that fact. If the Commission decides to allocate permanently another VHF channel, it seems to be agreed that the UHF stations will fold. The public will thereafter be governed by that circumstance. If a VHF allocation is made temporarily, pending consideration of its permanency, complete public uncertainty is created; both owners and buyers of sets would be thrown into a whirlpool of sales pressures, possibly to no permanent purpose. We see no public benefit in such a completely uncertain temporary arrangement.

Our dissenting brother says the public interest criterion should control in this matter. But the public interest in the UHF-VHF problem is the precise question which is to be answered by the Commission in the deintermixture proceeding. If UHF stations are not in the public interest they could not be authorized at all. If this court were to declare now that a new VHF station, which would eliminate UHF stations presently in an area, is in the public interest, that declaration would conclude the whole controversy now being so exhaustively explored by the Commission. We cannot do that on the evidence before us; indeed it is not our function to declare initially what is in the ultimate public interest. Our function goes to the preservation of an existing situation *pendente lite* where irreparable damage would ensue from an immediate and possibly temporary change.

Our dissenting brother also says the public wants VHF reception. But we do not know that to be so. The wide use of VHF sets may be due to the fact that VHF was available earlier, gave good service, and saturated the market before UHF came. The present wide ownership of VHF sets is not necessarily an indication that UHF is not better physical service and will not be preferred by the public when, as and if programs over it are comparable with VHF programs and VHF sets wear out. Progress and change are frequently in the public interest. The Commission, as we understand it, has that problem, among others, before it in the pending rule-making (deintermixture) proceeding.

We find specifically that the present allocation of Channel 10 to the Vail Mills area pending the outcome of the deintermixture proceeding would impose upon Greylock losses which it could not recover, and that this threat of loss is not offset by any vantage to the public interest.

The motion to reconsider and vacate our stay order will be denied.

DANAHER, *Circuit Judge, dissenting:* Pursuant to a proposal filed by Hudson Valley Broadcasting Company, Inc., found to comport with the Commission's present television allocation plan and rules, the Commission assigned VHF Channel 10 to Vail Mills, New York. The stay which the majority grants would have the effect not merely of precluding the Commission from accepting, processing and holding any hearing on applications for that channel until the present action shall have been finally determined. It would do more. The majority intends it to do more. As a practical fact, the majority would stay the Commission's hand "pending the outcome of the deintermixture proceeding." Under the circumstances of this case, such interference with the performance by the Commission of the duties entrusted to it does such violence to my understanding that I am bound to dissent.

The differences between my colleagues and me involve issues of policy in the division of authority as between the Commission and the court. It seems to me established that the public interest criterion should control. "Courts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest. . . . Courts no less than administrative bodies are agencies of government. Both are instruments for realizing public purposes."[1] Again the Court told us: "It is always easy to conjure up extreme and even oppressive possibilities in the exertion of authority. But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. . . . Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies."[2]

Such thinking should govern the instant case. Here, the Commission out of its own expertise found that the public interest required that additional VHF television broadcasting on available Channel 10 be brought to the affected area at the earliest possible moment. The Commission says: "Refusing to make use of this valuable VHF frequency as contemplated by the present rules would, we believe, be a waste of valuable spectrum space for which active demand is indicated. Channel 10 in Vail Mills will represent a second television service to an appreciable percentage of families residing in the area, as well as a first service to a significant number of families." Surely the Commission is authorized to make such a finding and to interpret the Act so as to achieve its purposes.[3]

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[1] Scripps-Howard Radio v. Comm'n., 316 U.S. 4, 15 (1942).

[2] Federal Comm'n v. Broadcasting Co., 309 U.S. 134, 146 (1940).

[3] § 301; § 303 (b), (d), (g), (h) and (r), among others; § 403. "The Supreme Court has admonished us many times to give 'great weight' to an agency's interpretation of its governing stat-

It is correct, as the majority say, that "Greylock and the Van Curler Broadcasting Corporation,[4] both UHF operators in the area, protested[5] and then appealed." Greylock, a UHF station, says it will be "irreparably injured" if the public is given what it wants, namely VHF television broadcasting.

Greylock's president and principal stockholder, in his affidavit supporting its motion for an immediate stay, tells us that "Operation on Channel 10 is at least a year away." But the Commission's rule-making proceedings may not be concluded within a matter of years.

Greylock's affidavit adds that if Channel 10 comes on the air, Greylock cannot successfully operate in the area to be served. This is another way of saying that the public demands the superior entertainment and the network broadcasting to be provided by VHF. I do not

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ute . . . ." Bazelon, J., in West Texas Utilities Co. v. N.L.R.B., 87 U.S. App. D.C. 179, 181, 184 F. 2d 233, 235 (1950).

"We are in accord here with the authorities which require great weight to be given an administrator's interpretation of the statute he is directed and empowered to administer." Prettyman, J., in Union Manufacturing Co. v. N.L.R.B., 95 U.S. App. D.C. 252, 255, 221 F. 2d 532, 536 (1955), *cert. denied*, 349 U.S. 921 (1955).

[4] We unanimously denied Van Curler's motion for a stay. Van Curler went off the air voluntarily, not because of a VHF allocation to Vail Mills but because Van Curler lost its network affiliation.

[5] Although not in point here, the desire of Congress may be seen from Public Law 391, approved January 20, 1956, which amended § 309(c), the protest provision of the Act. To accompany H.R. 5614 which became Public Law 391, Senate Rep. No. 1231 explained:

"The public may be deprived unnecessarily for a prolonged period of time of new radio or television service pending the outcome of the protest hearing. The Commission is now required, except where the continuance of an existing service is concerned, to stay the effectiveness of any protested grant until it issues a final decision on the protest after a full evidentiary hearing. Even where there is a pressing need for the service in question and little or no likelihood exists that there will be any grounds shown for setting aside the grant, the Commission is given no discretion to consider whether the public interest requires the grant to remain in effect."

understand that any licensee is guaranteed freedom from competition. Indeed, § 304 of the Act provides:

> "No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."

Our case comes to this, Greylock, WMGT, insists that the court shall provide it with a listening audience. I have no doubt that Greylock can be heard both in the Hudson Valley proceeding and in the Commission's rule-making hearings, now under way. Moreover, it can itself apply for Channel 10. Yet because the majority here finds "irreparable injury" it would stay the Commission's hand.[6]

Greylock asks the court to stay the Commission's hand to obviate "cancellation of UHF conversion orders." Thus the court is asked to stimulate the sale of converted sets which will represent a totally unnecessary expenditure by the viewing public if and when Greylock closes down its UHF broadcasting. That is Greylock's plan. Its president swears: "It will definitely be my recommendation to the petitioner's Board of Directors that WMGT discontinue its UHF operations if and when Channel 10 is utilized at Vail Mills. I am certain that the Board will adopt my recommendations." Since he is president and principal stockholder, it is reasonable to conclude that the corporation will do exactly as he says. So, after the area is saturated with conversions, Greylock will immediately apply for Channel 10 if this court shall have refused to stay the Commission's order.

Such evidence has been submitted. In my judgment, it falls far short of creating that degree of public injury for which Greylock in its own private interest is being

[6] Cf. Allen v. Grand Cent. Aircraft Co., 347 U.S. 535, 540 (1954).

permitted to speak. "The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff."[7]

I do not know what criteria will be relied upon by the Commission when it considers various proposals for "deintermixture." Moreover an ultimate disposition does not necessarily depend upon deintermixture, especially since desirable programming and live network telecasting are important facets in the public's choice. The November 10, 1955, "Notice of Proposed Rule Making" poses many of the complexities of a most difficult problem, the intricacies of which are singularly matters for Commission decision. Perhaps VHF operations on Channel 10 in this very area would have afforded the Commission data and information which would be invaluable in arriving at a correct result, whether it be a different allocation or a share-the-time form of broadcast or what not. At any rate, the solution lies singularly within the Commission's orbit, and meanwhile a needed and a wanted service should be provided. Steps to insure that it will be provided could have been taken—except for the court. I do not understand that we are the sole guardians of the "public interest."

It may well be that there should be more, not less competition. It may well be that there should be fewer UHF stations with greater power permitted to those allocated to a given area. The Commission has here specifically found that operation of Channel 10 is *in the public interest.* "If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will

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[7] Yakus v. United States, 321 U.S. 414, 440 (1944); and see Scripps-Howard Radio v. Comm'n, *supra* note 1, 316 U.S. at 14, 15.

act in accordance with its statutory obligations."[8] I believe the Commission's action was dutiful and within its province.

That is why I say my differences with my colleagues are fundamental. The claim for equitable relief is being treated as though the issue involved only a controversy between two litigants, while our true concern should involve a recognition of the proper distribution made by Congress for the exercise of legal authority by the Commission on the one hand, and by the courts on the other. It seems to me appropriate to recall what the Court said in the WJR case:[9]

> "At the outset we note our complete agreement with the Court of Appeals that the Commission was under no duty to WJR to postpone final action on the Coastal Plains permit until it had disposed of the clear channel proceeding. As the court pointed out, WJR had no vested right in the 'supposititious eventualities' that the Commission at some indeterminate time might modify its rules governing clear channel stations. Furthermore, the judicial regulation of an administrative docket sought by WJR 'would require [the Court of Appeals] to direct the order in which the Commission shall consider its cases.' And this, as the court said, it 'cannot do.' 174 F. 2d at 231."

But, here the majority would do it.

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[8] Nat. Broadcasting Co. v. United States, 319 U.S. 190, 225 (1943); cf. Commission v. Sanders Radio Station, 309 U.S. 470, 475, 476 (1940); cases cited in testimony of Commissioner Coy, *Hearings Before the Committee on Interstate and Foreign Commerce of the House on S. 658*, 82d Cong., 1st Sess., pp. 124 *et seq.* (1951).

[9] Communications Comm'n v. WJR, 337 U.S. 265, 272 (1949).

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 489

VAN CURLER BROADCASTING CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION AND HUDSON VALLEY BROADCASTING CO., INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App., 1a–9a) has not yet been reported. The Report and Order of the Federal Communications Commission (R. 94–111)* has not been officially reported; it is unofficially reported at 13 Pike & Fischer, Radio Regulation 1511.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the Commission's order, was entered on July 9, 1956.

*"R" refers to the Joint Appendix filed in the Court of Appeals.

The petition for a writ of certiorari was filed on October 8, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Commission erred in receiving an informal submission of material relating to nationwide television allocation problems during the pendency of a rule-making proceeding looking toward the amendment of the television allocation table to add a VHF channel at Vail Mills, New York.

2. Whether the Commission acted inconsistently with *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U. S. 327, when it adopted the proposal to add a VHF channel at Vail Mills and simultaneously rejected petitioner's proposal to delete the VHF channels in the area.

3. Whether the Court of Appeals erred in holding that the Commission's report adequately sets forth the reasons for its decision, as required by Section 4 (b) of the Administrative Procedure Act, 5 U. S. C. 1003 (b).

STATUTES INVOLVED

The pertinent provisions of the Administrative Procedure Act and of the Communications Act of 1934, as amended, are set forth in the petition.

STATEMENT

In April 1952, the Federal Communications Commission adopted a new Table of Assignments in which television channels were assigned to communities throughout the United States. (Sixth Report and Order, Docket Nos. 8736, et al., 17 F. R. 3905.) Un-

der this table, which was included in Section 3.606 of the Commission's Rules and Regulations, 47 CFR 3.606,[1] the Albany-Schenectady-Troy area in New York State was assigned VHF channel 6 and UHF Channels 17, 23 and 41.

The use of both VHF and UHF channels in the same community is commonly called "intermixture." It was concluded in the 1952 Sixth Report and Order that the fullest opportunity for a nationwide television service making the maximum use of available spectrum space would be afforded by intermixing UHF channels with VHF channels (which are capable of providing a greater coverage) in an integrated plan. (17 F. R. 3905, at 3912–3914.)

At that time, General Electric Company was already the licensee of station WRGB on Channel 4 in Schenectady. Its license was modified to specify Channel 6, in accordance with the new allocation plan. Channel 17 was reserved for a non-commercial, educational station. Patroon Broadcasting Company subseqently received a construction permit for Channel 23, but has never commenced operation. Hudson Valley Broadcasting Company, Inc. (Hudson Valley) went into operation on Channel 41 at Albany as WROW–TV. Petitioner Van Curler Broadcasting Corporation (Van Curler) was authorized to operate on Channel 35 at Albany, as WTRI.[2]

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[1] The Commission's authority to assign television channels by rule making had been sustained in *Logansport Broadcasting Corp.* v. *United States*, 210 F. 2d 24 (C. A. D. C.).

[2] This channel was originally assigned at Schenectady alone, but was later assigned to Albany-Schenectady-Troy jointly (19 F. R. 2900).

On November 4, 1954, Hudson Valley filed a petition for rule making to amend Section 3.606 to assign VHF Channel 10 at Vail Mills, New York (R. 2). The Hudson Valley proposal was opposed by Van Curler (R. 4) and Greylock Broadcasting Company (R. 15), which is the permittee of UHF station WMGT-TV, Adams, Massachusetts. Van Curler also included a counter proposal of its own, *i. e.*, that VHF Channel 6 be reserved for educational use and that the General Electric station on that channel be required to move to UHF Channel 17, a channel presently reserved for educational use and one for which the University of the State of New York holds a construction permit. This was a proposal to "deintermix" the commercial channels by making all commercial channels UHF channels.

On December 17, 1954, the Commission released a Notice of Proposed Rule Making And Orders To Show Cause, in which it afforded all interested parties an opportunity to comment on the proposals before it (R. 19). This notice also directed General Electric and the educational permittee to show cause why their authorizations should not be modified as proposed by Van Curler. After the receipt of comments in response to this notice, the Commission, on April 21, 1955, released a Notice of Further Rule Making (R. 35). The notice stated that the Van Curler proposal was similar to other deintermixture proposals which had been made by other parties in then-pending proceedings concerning other communities, and that since a uniform policy was desirable if changes in the exist-

ing pattern of intermixture were to be made, the same type of information and data which had been requested in the other proceedings should also be furnished here. It therefore requested further comments directed to six specific categories of information. The parties thereupon submitted additional comments in response to this second notice. (See R. 44–80.)

On June 27 and 28, 1955, the Commission heard oral argument in this proceeding, together with argument in other pending proceedings in which deintermixture of VHF and UHF channels in other cities had been proposed (R. 80). Subsequently, Van Curler requested that the instant proceedings be reopened upon the basis of a contention that Columbia Broadcasting System, Inc. (Columbia) had made informal presentations to the Commission which allegedly affected the proceeding (R. 89).

On November 10, 1955, the Commission adopted the Report and Order here involved, three Commissioners dissenting (R. 94–111). This Report denied the various specific requests for "selective" deintermixture, because they would not provide a meaningful solution to the general problems which had been raised and which the Commission found should be considered on a nationwide basis (R. 99–103). The Commission simultaneously instituted a new general proceeding to review the whole allocation question on such a basis. (Docket No. 11532, 20 F. R. 8501.)

The Commission granted the proposal to assign Channel 10 to Vail Mills. It pointed out that this assignment did not require any departure from the

principles behind the existing plan, and that it would provide a new service to the public. The proposal was adopted in order that the wide coverage which a VHF channel could provide should not be withheld pending some possible future decision on the general allocation problems. (See R. 99, 103–104.[3]) With respect to the request to reopen the proceedings because of the material submitted by Columbia, the Commission pointed out that this material did not bear on the merits of any particular petitions then being ruled upon, save to the extent that any discussion devoted to nationwide allocation problems might do so, and that the Commission, of course, must keep in touch with such general suggestions, whether informally submitted to it or to Congress. The Commission stated that the new general rule-making proceeding which was being instituted contemporaneously would afford all parties an opportunity to propose, and comment upon, such general solutions. It concluded that there was therefore no reason to reopen

[3] The allocation of an additional VHF channel here, it may be noted, was not an isolated case. The Commission has consistently endeavored to make the fullest use of these channels, which are scarcer than UHF channels. Many VHF channels have been added to the table of assignments since 1952, especially in small communities near large centers of population. See, *e. g.*, the assignment of VHF Channel 6 at Whitefish Bay, Wisconsin, near Milwaukee (18 F. R. 8135); the assignment of VHF Channel 9 at Hatfield, Indiana, near Evansville, Indiana, and Owensboro, Kentucky (18 F. R. 5678); and the assignment of VHF Channel 10 at Parma and Onondaga, Michigan, near Jackson (19 F. R. 429).

the prior proceedings to insert comments, and possible replies, directed to nationwide plans (R. 104–105).[4]

The Court of Appeals, sitting *en banc*,[5] affirmed the Commission's order, two judges dissenting. The court held that the Commission had complied with the Administrative Procedure Act (Pet. App. 4a); that it had followed a course anticipated and provided for in the Sixth Report (Pet. App. 4a–5a); and that the report adequately stated the basis and purpose of the rule change (Pet. App. 5a). It found no error with respect to the Commission's decision on the *ex parte* submission of Columbia, observing that the Commission was merely receiving advice and information on nationwide allocation problems with respect to which a new general rule-making proceeding was being instituted (Pet. App. 5a).

ARGUMENT

Contrary to petitioner's contention, the decision of the Court of Appeals raises no novel question of administrative law. The Court of Appeals merely ap-

[4] As petitioner notes (Pet. 12, fn.), the Commission has since proposed the deletion of Channel 10 from Vail Mills. (21 F. R. 4970.)

[5] Petitioner claims that the Court of Appeals sat *en banc* because of the importance of the issues (Pet. 12). However, we think it likely that the court heard this case *en banc* principally because of its similarity to *Coastal Bend Television Co.* v. *Federal Communications Commission*, 234 F. 2d 686 (C. A. D. C.), heard *en banc* the same week, in which several UHF stations sought review of the denial of deintermixture petitions and grants of new VHF licenses. The court stated that the cases were "closely akin" (Pet. App. 2a). Petitioner does not argue in this Court the validity of the denial of its deintermixture petition, which was the main point of similarity with the *Coastal Bend* case.

plied the established standards governing review of administrative rule making; and it correctly determined that the Commission had reached a reasonable conclusion on the record before it and had conducted the proceeding in full accord with the Administrative Procedure Act. The petition therefore presents no question calling for further review by this Court.

1. Petitioner first contends (Pet. 13–16) that it is improper in a rule-making proceeding to permit "secret intervention" by one not a formal party. But this argument misconceives the situation before the Commission. The Court of Appeals found that the Columbia Broadcasting System submissions "were in regard to the nation-wide intermixture problem, concerning which the Commission was seeking all sorts of advice and information preparatory to setting up a general nation-wide rule-making proceeding to deal with intermixture. We find nothing improper or erroneous in the Commission's consideration of these interviews as depicted in this record." (Pet. App. 5a.)

This conclusion, we submit, was correct. The Commission has a continuing responsibility to keep abreast of current problems in the industry it regulates. In the nature of things, it is constantly made aware, as it should be, of general suggestions, whether they are informally brought to its direct attention or submitted to Congress. The informal submission by Columbia of the results of its study of the national television allocation plan—a submission which added to the Commission's general store of knowledge—surely does not serve to invalidate a quasi-legislative

proceeding dealing with assignment of a specific channel.

The Court of Appeals properly found that no more was involved. For the Commission's opinion denying petitioner's request to reopen the record shows that the Commission did not consider this material in connection with the Vail Mills proceeding. The Commission made clear that it was acting upon the record before it and that general allocation proposals and discussions, like Columbia's, were being deferred to the new, general rule-making proceeding instituted that day, where they could be formally submitted (R. 104–105). It concluded in its report that no useful purpose would be served in reopening the proceeding "to insert comments, and replies thereto, whose function is to discuss nationwide plans and whose proper forum is the general rule making proceeding in which all interested parties may participate." (R. 105.)

2. Petitioner's argument (Pet. 16–17) that the Commission erroneously granted the petition of Hudson Valley to add VHF Channel 10 at Vail Mills, because it simultaneously postponed consideration of petitioner's mutually exclusive request to deintermix the area by eliminating all of the commercial VHF channels, is also based upon a misconception of what the Commission did and the governing legal principles.

The Commission did not postpone consideration of the request to deintermix; it denied it. It did so because it found that petitioner's deintermixture request, like the similar requests of other parties re-

lating to several different communities, could not be considered apart from general problems of allocation which would have to be determined on a nationwide, rather than an *ad hoc,* basis (R. 102–103). The denial of such other deintermixture requests was sustained by the Court of Appeals in *Coastal Bend Television Co.* v. *Federal Communications Commission,* 234 F. 2d 686 (C. A. D. C.).

Ashbacker Radio Corp. v. *Federal Communications Commission*, 326 U. S. 327, upon which petitioner relies (Pet. 16–17), is not relevant here. This Court held in *Ashbacker* that an applicant for a license was denied his statutory right to a hearing (see Section 309 of the Communications Act, 47 U. S. C. 309) when a mutually exclusive application was granted and he was relegated to a subsequent hearing in which he would have the burden of displacing the first grantee. Here, the question was not one of choosing between competing licensees in adjudicatory proceedings.[6] The question was whether the Commission should adopt Hudson Valley's proposal for a single change of assignment under the existing allocation plan, or should adopt petitioner's proposal that there be a fundamental revision of the basic premise upon which the existing allocation table rests. The Commission refused to scrap the existing basis of al-

[6] No license grant is involved in this case. The question before the Commission was the allocation by rule making of a channel for which individuals might apply. See *American Trucking Assns.* v. *United States*, 344 U. S. 298, distinguishing rule-making and adjudicatory proceedings.

location under which it has long been operating.[7] There is no inconsistency in the fact that the Commission left petitioner free to urge deintermixture in a subsequent proceeding devoted to re-examination of the general problems of allocation. This was but a recognition that abandonment of the existing intermixed plan would raise problems which could only be met adequately in a rule-making proceeding of nationwide scope. The Commission need not cease acting under rules long since adopted and sustained by the courts in order to consider the feasibility of adopting amended rules embracing a new and fundamentally different system of allocation. On the contrary, this is a situation in which the precept that the Commission must have broad discretion to order the sequence of its business (see *Federal Communications Commission* v. *WJR, the Goodwill Station, Inc.*, 337 U. S. 265, 272) applies with particular force.

3. Finally, petitioner claims a failure on the Commission's part to comply with the requirement of Section 4 (b) of the Administrative Procedure Act, 5 U. S. C. 1003 (b), that "the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose * * *." (Pet. 17–24.) The same contention was made to the Court of Appeals, which specifically found that the purpose in assigning Channel 10 to Vail Mill was adequately stated and that the decision had a rational basis. (Pet. App. 4a–5a.) Petitioner's challenge to this hold-

[7] Petitioner, while it sought review below of the denial of its deintermixture proposal, raises no issue here as to the validity of that denial.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 489

VAN CURLER BROADCASTING CORPORATION, *Petitioner,*

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, and HUDSON VALLEY BROADCASTING COMPANY, INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT HUDSON VALLEY BROADCASTING COMPANY, INC.

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BRIEF IN OPPOSITION FOR RESPONDENT HUDSON VALLEY BROADCASTING COMPANY, INC.

QUESTIONS PRESENTED

1. Whether the Commission erred in receiving informal suggestions directed not to this proceeding but to nationwide television allocation problems during the pendency of a rule making proceeding looking toward the addition of VHF television channel 10 to Vail Mills, New York.

2. Whether the Commission acted inconsistently with *Ashbacker Radio Corp.* v. *FCC,* 326 U.S. 327

(1945), when it adopted the proposal to add Channel 10 to Vail Mills and simultaneously denied petitioner's counterproposal to delete the only existing VHF channel in the area.

3. Whether the Court of Appeals erred in holding that the Commission's report and order does contain "a concise general statement of the basis and purpose" of the addition of Channel 10 to the area, as required by section 4(b) of the Administrative Procedure Act, 5 U.S.C. § 1003(b).

COUNTERSTATEMENT OF THE CASE

The temptations of advocacy resulted in a statement on behalf of petitioner which in major respects does not represent the true nature of the controversy under consideration. Accordingly, a few further factual observations are required.

Petitioner challenges the validity of the allocation by the Federal Communications Commission of VHF television channel 10 to Vail Mills, New York. In its petition, Van Curler Broadcasting Corporation alludes to the fact that Vail Mills has a population of only some 250 persons. (Petition pp. 4, 12.) This is correct. However, petitioner neglects to inform the Court that a VHF television operation on Channel 10 at Vail Mills will result in a Grade A signal being received in the highly populous Tri-Cities area of New York, encompassing Albany, Troy, and Schenectady.

Thus, facts before the Commission demonstrated, among other things, that a Channel 10 operation from Vail Mills would furnish a Grade A television signal to 842,752 people, and a Grade B signal to 1,187,686 people. An area of over 2,000 square miles, containing

24,479 families, would receive a Grade A signal from such a station which now receives no other Grade A signal at all. Respondent Hudson Valley Broadcasting Company presently operates a UHF television station in Albany; the Grade B contour on Channel 10 from Vail Mills would encompass three times the area and twice the population of Hudson Valley's present UHF operation. [R. 366 (J.A. 51-52), R. 899 (J.A. 84-85).] Further, letters from responsible organizations in the area speaking for over 250,000 people were submitted to the Commission urging the allocation of Channel 10. [R. 81 (J.A. 23-24), R. 82-204, R. 899 (J.A. 85).] The Commission's allocation of Channel 10 to Vail Mills was based upon facts such as these.

Petitioner Van Curler does not portray accurately the competitive broadcast situation in the Tri-Cities area at the time of the allocation. Only two television stations were then in operation in Albany-Troy-Schenectady. One was a VHF television station owned and operated by the General Electric Company. The other was respondent Hudson Valley's UHF station.[1] Thus, at the time of the allocation, one UHF station (respondent Hudson Valley's) was competing with one VHF station in the Tri-Cities, and respondent's station was suffering heavy operating losses.[2] [R. 308 (J.A. 35-36), R. 355 (J.A. 44), R. 898 (J.A. 84).]

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[1] The allocation of Channel 10 to Vail Mills was made on November 10, 1955. At that time, petitioner's UHF station in Troy was not in operation, having left the air on January 31, 1955, due to operating losses. [R. 308 (J.A. 36).] It should be noted, however, that petitioner's station recently (June 15, 1956) resumed operations with a limited program schedule.

[2] The case below was a consolidated one, including two petitions for review. One, Case No. 12989, was brought by Greylock Broadcasting Company, which formerly operated a UHF station

Clarification also is called for with regard to the nature of the allocation which petitioner seeks to have this Court review. Van Curler's petition loosely contends that the allocation of Channel 10 to the area would result in less stations rather than more. (Petition pp. 5, 22.) Such arguments are without merit, and are based upon sheer speculation as to the future competitive effects of a new VHF station in the area. In fact, the evidence before the Commission pointed to contrary assumptions. Respondent Hudson Valley determined that Channel 10 could be added to Vail Mills in compliance with the Commission's existing engineering standards. The ultimate addition of Channel 10 by the Commission left undisturbed all of the other allocations in the area, and simply provided one more channel upon which a television station could be operated to serve the public.

In attempting to make this case appear to be of importance to other than the parties, petitioner also states: "The issues so impressed the Court of Appeals that it heard argument *en banc* on its own motion." (Petition p. 12, see also Petition p. 25.) This is incorrect.

While petitioner and Greylock Broadcasting Company were appealing from the allocation of Channel 10 and the denial of Van Curler's deintermixture proposal, eight other appeals were noted involving other deintermixture denials and the grants of VHF con-

in Pittsfield, Massachusetts. Its Pittsfield studios were 30 miles from Albany and Troy, and 45 miles from Schenectady. [R. 53 (J.A. 17).] While its signal reached into parts of the Tri-Cities area, it was not a Tri-Cities station, just as a Baltimore station does not become a Washington station simply because its signal can be received in parts of the Washington area.

struction permits in the cities concerned. Those cases were consolidated, and became known as the *Coastal Bend* cases.[3] On February 20, 1956, the petitioners and appellants in the *Coastal Bend* cases filed motions in the Court of Appeals requesting that their cases be consolidated with the Channel 10 appeals, and that they be heard en banc. On February 23, 1956, responses thereto were filed by respondent Hudson Valley, and by the United States and the FCC. All three respondents opposed consolidation with the *Coastal Bend* cases, but stated they had no objection to the cases being heard en banc. They were subsequently designated on April 4, 1956, for en banc hearing.[4]

Certain further factual inaccuracies in Van Curler's petition for certiorari are treated in the Argument, *infra.*

ARGUMENT

Preliminary Statement

No sound reason is advanced by petitioner for the granting of a writ of certiorari in this case. None of the reasons justifying certiorari as set forth in Rule 19(b) of this Court are applicable here, and no other factors warranting the exercise of the Court's discretion have been presented by Van Curler.[5]

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[3] Consolidated therein were Cases No. 13034, 13035, 13038, 13039, 13056, 13057, 13058, and 13065.

[4] The *Coastal Bend* cases were decided June 7, 1956, with the Court of Appeals unanimously affirming the Commission action there challenged. *Coastal Bend Television Co.* v. *FCC,* 234 F. 2d 686 (D.C. Cir. 1956).

[5] *E.g.,* see *NLRB* v. *Pittsburgh Steamship Co.,* 340 U.S. 498, 502 (1951); *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U.S. 387, 393 (1923).

As to Petitioner's "Question 1"

The Administrative Procedure Act ". . . is based upon a broad and logical dichotomy between 'rule-making' and 'adjudication', *i.e.*, legislative and judicial functions."[6] The allocation of Channel 10 to Vail Mills was made by the Commission after a rule making proceeding which lasted nearly a year and resulted in a 960 page record. It was conducted in accordance with section 4 of the Administrative Procedure Act.[7] It is well settled (and petitioner does not challenge) that the Commission may allocate channels in its discretion pursuant to the rule making process.[8]

Petitioner does not contend that it was denied a full opportunity to be heard in the rule making proceeding, nor does it contend that the Commission's report and order is not supported by substantial evidence. Rather, it contends in its "Question 1" that the proceeding was invalidated by virtue of the fact that the Columbia Broadcasting System submitted to the Commission its suggestions as to the nationwide television allocation problems at a time when the instant proceeding was pending.

There are two fatal defects in petitioner's contentions. In the report and order which resulted in the

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[6] *Willapoint Oysters, Inc.* v. *Ewing*, 174 F. 2d 676, 692 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949).

[7] Act of June 12, 1946, c. 324, 60 STAT. 238, 5 U.S.C. § 1003.

[8] *Logansport Broadcasting Co.* v. *United States*, 93 App. D.C. 342, 210 F. 2d 24 (1954); *Peoples Broadcasting Co.* v. *United States*, 93 App. D.C. 78, 209 F. 2d 286 (1953). It should be noted that the "drop-in" here involved was not unusual; it represented the 21st time that a VHF channel has been added to an area in accordance with the Commission's existing engineering standards.

allocation of Channel 10 to Vail Mills and the denial of Van Curler's deintermixture proposal, the Commission decided five separate and distinct rule making matters.[9] It pointed out that suggestions on the nationwide problems had been received from various parties, but stressed that such suggestions did "not pertain to the merits of granting or denying the particular petitions before us, except as part of such a nationwide approach." [R. 955 (J.A. 104).] The Commission made it clear in its report and order that its decisions were based upon the records in the individual cases. [*Ibid;* see also R. 952 (J.A. 101).] Further, in certifying the record to the Court of Appeals, the Commission attached a sworn statement attesting that it contained all of the evidence which was considered in reaching the decisions involved.[10]

Seven judges of the Court of Appeals squarely held that CBS' nationwide comments, like those of others, were not directed toward, and had no effect upon, this particular proceeding. (Petition p. 5a.) Further, the two dissenting judges placed no reliance upon any ex-

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[9] They involved Peoria, Illinois (Docket No. 11333); Evansville, Indiana (Docket No. 11334); Madison, Wisconsin and Rockford, Illinois (Docket No. 11335); Hartford, Connecticut (Docket No. 11336); and Albany-Troy-Schenectady (Docket No. 11238). [R. 948-51 (J.A. 94-99).]

[10] Petitioner relies upon the dissenting opinion of Commissioner Hyde, which included a statement that material beyond the record had been considered. (Petition p. 15.) However, Commissioner Hyde's dissent makes it clear that he was not referring to the allocation of Channel 10 to Vail Mills, nor did he refer to CBS' comments. Rather, his actual language reveals that he was dissenting solely to the denials of "some 26 petitions" for deintermixture, being of the view that *they* had not been considered properly on their merits. [R. 957-58 (J.A. 108-10).]

traneous nationwide suggestions. Van Curler makes no further showing in its petition for certiorari than it did in the Court of Appeals that the Commission's decision was in any way influenced by CBS' comments.[11]

There is a second fatal defect in petitioner's arguments. Factually, they are based upon a totally fallacious premise. Petitioner refers to "secret comments" and "secret intervention" on the part of CBS. (Petition pp. 2, 11, 14.) However, CBS' comments were not "secret," and CBS did not "intervene" (formally or otherwise) in this proceeding.

As an administrative agency of broad jurisdiction, of necessity the Commission at any given moment in time is affording concurrent consideration to numerous matters, some adjudicatory and some rule making in nature. So it was in this case. Various specific adjudicatory and rule making proceedings were pending, relating to television markets (areas) all over the

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[11] It should be noted, however, that it would not have been improper even if the Commission had considered information from other sources in regard to the allocation of Channel 10. The purpose of section 4 of the Administrative Procedure Act was expansive rather than restrictive as regards the submission of comments. Speaking of the requirement of section 4(b) that interested parties be afforded an opportunity to present their views, both the Senate and House Reports accompanying the legislation made a particular point of stressing that:

> "This subsection states, in its first sentence, the minimum requirements of public rule making procedure short of statutory hearing. Under it agencies might in addition confer with industry advisory committees, consult organizations, hold informal 'hearings,' and the like."

Administrative Procedure Act, Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 200, 259 (1946).

country. While these matters were before the Commission, concern arose throughout the industry as to the entire nationwide television allocation system. Numerous informed industry organizations, including CBS, made available to the Commission their ideas as to how best to establish a nationwide competitive television structure.

CBS' comments, like those of numerous other organizations, were in no sense secret. They were directed to nationwide problems and were widely reported on in reliable industry publications. So that the Court may fully understand the true nature of what CBS suggested, respondent Hudson Valley is appending hereto the report published by *Television Digest* on the actual "secret" comments of which petitioner would make so much. (The same material also was submitted to the Court of Appeals as an appendix to Hudson Valley's brief.)

The Commission received the CBS comments, as it received those of others, quite properly seeking every possible informed opinion as to the nationwide allocation problems with which it was faced. This method of proceeding is completely normal and commonplace with the Commission, as anyone familiar with its practice knows.[12] In fact, it is difficult to imagine how the

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[12] The truly frivolous nature of petitioner's arguments is illustrated by a reference to the proceeding in the Court of Appeals. Greylock Broadcasting Company, whose petition for review in Case No. 12989 was consolidated with Van Curler's Case No. 12987, also sought review of the allocation of Channel 10. Greylock, represented by competent and experienced counsel, never made any argument whatsoever in either its original brief or its reply brief to the effect that there was anything prejudicial or illegal about the submission of nationwide comments by anyone.

Commission could properly perform its complex duties in any other fashion.

As to Petitioner's "Question 2"

Like its first, petitioner's "Question 2" also is based upon a false premise. Petitioner asks this Court to determine whether the rule of the *Ashbacker* case,[13] holding that the Commission may not make an adjudicatory grant of one of two mutually exclusive applications without affording a hearing to the other, can be extended from the adjudicatory field into the rule making field. As a part of its argument, petitioner contends that the Commission granted respondent Hudson Valley's rule making proposal but "postponed consideration" of its counterproposal to remove all VHF channels from the Tri-Cities area. (Petition pp. 2, 16.)

However, such a situation is not presented here. At the conclusion of the lengthy rule making proceeding here involved, the Commission did not "postpone consideration" of petitioner's deintermixture proposal; it unequivocally and specifically denied it along with the others which were then before it. [R. 954 (J.A. 103), R. 956 (J.A. 107).] Further, respondent's proposal to add Channel 10 and petitioner's proposal to deintermix the area were not "mutually exclusive applications" within the scope of the *Ashbacker* case; they simply were counterproposals in a single rule making proceeding.

As to Petitioner's "Question 3"

Section 4(b) of the Administrative Procedure Act, pursuant to which the Commission's rules were

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[13] *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945).

amended to provide for the allocation of Channel 10 to Vail Mills, provides that an agency "shall incorporate in any rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 1003(b).

In contending that the Commission's allocation of Channel 10 failed to comply with this requirement, petitioner is somewhat less than forthright. It extracts one phrase from the Commission's "concise general statement," and argues that it does not adequately give the "basis and purpose" of the allocation. (Petition pp. 18, 19, 23, 24.) However, one need only read the relevant portion of the actual report and order of the Commission to realize that it does indeed contain a concise general statement of the basis and purpose of the addition of a second VHF television service to an area of over one million people.[14] [R. 954 (J.A. 103-04).]

Petitioner advances numerous arguments which it contends the Commission should have answered specifically. However, both the legislative history of the Administrative Procedure Act and subsequent judicial decisions have made it clear that when acting legislatively through rule making, an agency need not answer every argument advanced by every participant in the proceeding.[15]

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[14] Certain further facts on which the Commission based its general statement have been set forth on pp. 2-3 of the Counterstatement of the Case, *supra*.

[15] *E.g.*, the Attorney General stated:

> "Section 4(b), in requiring the publication of a concise general statement of the basis and purpose of rules made without formal hearing, is not intended to require an elaborate analysis of rules or of the detailed considerations upon which they are based, but is designed to enable the public to

In essence, it should be observed that all of petitioner's litigious efforts regarding the addition of a new television channel to the Tri-Cities area have been directed at keeping out further competition. However, this Court has made it clear that "the field of broadcasting is one of free competition," stating:

> "In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel."[16]

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obtain a general idea of the purpose of, and a statement of the basic justification for, the rules."

Legislative History, supra n. 11, at 225, 409.

Further, it has been held that to require an agency to discuss every argument advanced "would be to impose upon it a totally unnecessary burden." *Logansport Broadcasting Co.* v. *United States, supra* n. 6, 93 App. D.C. at 346, 210 F. 2d at 28.

[16] *FCC* v. *Sanders Brothers Radio Station,* 309 U.S. 474-75 (1940).

CONCLUSION

Petitioner has presented no question which would warrant the issuance of a writ of certiorari. The decision of the Court of Appeals is eminently sound, and correctly ruled that the rule making proceeding which culminated in the allocation of Channel 10 to Vail Mills was conducted in full compliance with all applicable statutory and judicial standards. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 7, 1956

APPENDIX

Description of the Columbia Broadcasting System's suggestions on the nationwide allocation problems which was published on page 8 of the October 8, 1955 issue of *Television Digest:*

"Allocations changes suggested by virtually everyone so far have one thing in common—that substantial number of vhf assignments can be made in major cities by dropping present mileage-power minima. Where they differ is in degree—and the role of uhf.

"* * * [Suggestions of the American Broadcasting Company omitted]

"CBS's 'Plan A' would put 3 or more vhf channels in 84 of top 100 markets instead of 52 currently in prospect. It would do this by:

"(1) Reduction of co-channel mileages to 130 in Zone I, 140 in Zone II, 150 in Zone III—but protecting co-channel stations' Grade B contours even more than present rules protect them.

"(2) Use of directional antennas.

"(3) Employment of vertical polarization.

"(4) Deintermixture in Peoria and Madison only, leaving them all-uhf.

"(5) 'Move-ins' of 8 vhf stations from smaller to larger cities.

"CBS's 'Plan B' assumes 3 more channels might be obtained—88-94 mc from FM, 134-140 mc from military, 168-174 mc from govt. non-military—and uhf would be eliminated. This would provide 3 or more vhf channels in first 100 markets plus 50 or so more stations in markets not covered by stations in first 100 markets. Operating uhf stations would be shifted to vhf wherever possible, but some 60 uhfs wouldn't get vhf in their present markets.

"CBS presentation, submitted as letter to FCC, not a petition, recommends that Plan A be adopted immediately unless 3 extra channels can be obtained quickly. In latter case, it says Plan B is preferable.

"CBS acknowledges that there's conversion problem in Plan B; that present sets aren't equipped to get new channels. But it estimated conversions can be made for $10-$20, plus $10 more if vertical polarization is used.

"Criticism of 'Mullaney Plan,' advanced by CBS, is that new stations would be so closely spaced that they'd seriously reduce coverage of existing stations while having only very small coverage themselves."

A considerably more detailed analysis of the CBS suggestions (along with those of certain other organizations) may be found in *Broadcasting-Telecasting Magazine,* October 10, 1955, pp. 27-29.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 489

VAN CURLER BROADCASTING CORPORATION, *Petitioner,*

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION AND HUDSON VALLEY BROADCASTING CO., INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF VAN CURLER BROADCASTING CORPORATION

The petition for certiorari raised three questions of general importance to the administrative exercise of rule-making functions under Section 4 of the Administrative Procedure Act (5 U.S.C. § 1003). Respondents do not deny the importance of the first two of these questions. Rather, they contend that these questions are not actually presented by this case because the factual picture is not exactly as petitioner

painted it. Respondents do deny the importance of the third question, but their only argument in support of this denial is that the question, which has never been resolved by this court, was correctly decided below.

1. The first question asks whether the procedural safeguards provided for public rule making by Section 4 of the Administrative Procedure Act prohibit secret intervention by, and *in camera* arguments from, interested parties who have not made their appearance in the public proceedings held pursuant to Section 4. The government's brief does not deny the secret intervention or the *in camera* arguments. It does not deny that an interested network, the Columbia Broadcasting System (CBS), opposed each of petitioner's specific rule making proposals for television channel allocations in the Albany (Vail Mills) area at an "unprecedented" two-and-one-half hour, closed-door meeting with members of the Federal Communications Commission (Pet. 6-7, 15). It does not deny that petitioner was given no opportunity whatever to know the contents of the CBS presentation, or to rebut it. (Pet. 7, 13-16) It does not deny that this procedure violated the ground rules laid down by the Commission itself for this very case (Pet. 6-7, 14-15).

But, says the government, the Commission "did not consider this material in connection with the Vail Mills proceeding." (Br. 9) The record support given for this contention is the Commission's statement that the CBS comments did not "pertain to the merits of granting or denying the particular petitions before us, except as part of . . . a nationwide approach" [R. 955 (J.A. 104)]. Thus, the Commission did not say that it "did not consider" the material. It said only

that the material did not "pertain to" Vail Mills, "*except* as a part of . . . a nationwide approach." (Emphasis added) The Commission, moreover, admitted that it had "knowledge" of "suggestions informally submitted . . ." [R. 955 (J.A. 104-105)]. And, dissenting Commissioner Hyde stated that material "*de hors* the record, *has been considered* in reaching [the] conclusions" made in this case [R. 957 (J.A. 109), emphasis added].

The government's contention is thus without basis in the record. Moreover, even if the CBS presentation pertained to a nationwide proceeding, as the Commission's opinion states, the government cannot and does not deny that the presentation also related to the specific area in question here, i.e., Albany-Vail Mills. That the presentation related to more than one proceeding thus seems wholly irrelevant.

What effect the CBS presentation had upon the Commission is, of course, not clear from the record. Petitioner alleged that that effect was prejudicial because of the obvious inconsistency of the Commission's actions involving Vail Mills and Albany with its simultaneous other actions involving numerous other areas (Pet. 15-16, 8-9). We believe, however, that the arguments set forth in the petition show that the CBS *ex parte* intervention was error regardless of its effect upon the Commission. Administrative proceedings should not only do justice but should give the appearance of doing justice.

The petition shows, and the government does not deny, that the first question is of importance in the administrative exercise of rule making powers under the Administrative Procedure Act. The government's

painted it. Respondents do deny the importance of the third question, but their only argument in support of this denial is that the question, which has never been resolved by this court, was correctly decided below.

1. The first question asks whether the procedural safeguards provided for public rule making by Section 4 of the Administrative Procedure Act prohibit secret intervention by, and *in camera* arguments from, interested parties who have not made their appearance in the public proceedings held pursuant to Section 4. The government's brief does not deny the secret intervention or the *in camera* arguments. It does not deny that an interested network, the Columbia Broadcasting System (CBS), opposed each of petitioner's specific rule making proposals for television channel allocations in the Albany (Vail Mills) area at an "unprecedented" two-and-one-half hour, closed-door meeting with members of the Federal Communications Commission (Pet. 6-7, 15). It does not deny that petitioner was given no opportunity whatever to know the contents of the CBS presentation, or to rebut it. (Pet. 7, 13-16) It does not deny that this procedure violated the ground rules laid down by the Commission itself for this very case (Pet. 6-7, 14-15).

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The petition shows, and the government does not deny, that the first question is of importance in the administrative exercise of rule making powers under the Administrative Procedure Act. The government's

attempts to avoid this question are, as we have just shown, without success. We submit that the question merits the grant of certiorari.

2. The second question asked whether rule-making proceedings under Section 4 of the Administrative Procedure Act are subject to the rule of *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U.S. 327, so that the Commission should not have granted the rule-making proposal of one party while at the same time postponing consideration of the mutually exclusive counter-proposal of another party. The respondents also seek to avoid this question.

The government concedes that the two rule-making proposals were mutually-exclusive, and it does not deny that one of them was granted and the second was not. The government contends however (Br. 9-10) that the Commission "did not postpone" the second proposal; "it denied it."

This is clearly a quibble. The record shows that while the second proposal, deintermixture, was in form denied; it was in substance postponed. The Commission simultaneously instituted a new proceeding to consider petitioner's and other parties' arguments for deintermixture [R. 953-954 (J.A. 102-103)]. While it denied petitioner's proposal pending the outcome of the new proceeding, it did so "without prejudice" to any action it might take on the proposal in the later proceeding, and without any consideration of the merits of deintermixture in Albany (Ibid).

Petitioner's proposal was thus denied in form but not in substance. The *Ashbacker* question, which the government does not deny is important, is therefore raised by this case and should be considered.

3. The third question asks whether the Commission complied with the provisions of Section 4 of the Administrative Procedure Act which require a statement of the "basis and purpose" of a new rule by promulgating such a rule with a general statement which made no reference to the issue posed in ordering rule making, and which gave no indication of the specific statutory basis for action. That the Commission's opinion failed to contain any language showing which of several statutory standards had been the basis for its action the government does not deny. Nor does the government deny that the Commission failed to resolve the basic factual question which the Commission had itself asked during the proceedings: whether the allocation of a VHF channel would prevent or hinder the ultimate utilization of the UHF channels already allocated to the area.

While not denying that the third question stated by petitioner is presented by this case, the government says this issue is unimportant. As our petition shows, however, this Court has repeatedly considered similar issues in pre-Administrative Procedure Act cases involving both rule making and adjudication before administrative agencies. Whether the doctrine of these cases is applicable to rule-making proceedings carried on pursuant to Section 4 of the Administrative Procedure Act has not yet been decided by this Court.

The decision of the court below on all three questions presented constitutes a ruling that the provisions of Section 4 of the Administrative Procedure Act do not impose upon administrative agencies promulgating rules some of the most rudimentary requirements of fair procedure applicable in adjudicatory proceedings.

The Court of Appeals for the District of Columbia Circuit is the principal court to which problems of federal administrative procedure are presented. An important pronouncement by that court *en banc* which, without precedent from this Court, relieves administrative agencies of compliance with standards of fairness, is clearly a proper subject of review by this Court.

Respectfully submitted,

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